No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Fourth Circuit in this case created a conflict with nine other circuits over the proper interpretation of 18 U.S.C. 922(g)(9) and 921(a)(33)(A). The Fourth Circuit erred in concluding that persons who are convicted of misdemeanor crimes of domestic violence against their spouses or children are barred from possessing a firearm under 18 U.S.C. 922(g)(9) only if the statute under which that person was convicted includes, as an element, a domestic relationship between the perpetrator and the victim. Respondent acknowledges the conflict, but seeks to diminish its significance. Nonetheless, the question is one of recurring importance. Respondent's arguments in defense of the Fourth Circuit's decision provide no reason to avoid resolving the conflict among the circuits, and they in any event lack merit.

If allowed to stand, the Fourth Circuit's decision will substantially impede enforcement of a law designed to

provide a nationwide solution to a nationwide problem: the possession of firearms by those convicted of misdemeanor crimes of violence in a domestic context. This Court's review is therefore warranted.

A. The Conflict Among The Courts Of Appeals Merits This Court's Review

As the Fourth Circuit itself acknowledged (Pet. App. 22a n.12), and as respondent concedes (Br. in Opp. 2), the decision below conflicts with the decisions of every other court of appeals to address the issue. See *United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003), and 543 U.S. 1057 (2005); *United States* v. *Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States* v. *Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States* v. *Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999).

1. Respondent asserts (Br. in Opp. 2-7) that this acknowledged conflict is not "important" because a number of States have now enacted domestic-violence statutes that contain a domestic-relationship element. That argument overlooks the fact that a substantial number of States also have *not* enacted such statutes. In any event, the issue remains significant even in States that have enacted misdemeanor domestic-violence laws. Although it is certainly true that, in such States, "[d]omestic abusers can and will be charged and convicted of an offense that * * * [will] constitute a 'misdemeanor crime of domestic violence'

under any circuit's interpretation," *id.* at 4, it is also true that domestic abusers can and will be charged and convicted of *other* offenses, including simple assault and battery, that do not satisfy the Fourth Circuit standard.[1] Moreover, that it may *now* be possible for prosecutors in a number of States to bring charges under recently enacted misdemeanor domestic-violence laws does not alter the analysis applicable to persons who, like respondent, were convicted of domestic violence before those laws were enacted.

2. Respondent also contends that the conflict is unimportant because Section 922(g)(9) itself contemplates the possibility of inconsistent application (Br. in Opp. 7-9), and because the conflict among the circuits will impose no meaningful additional burdens on the administration of federal firearms laws (*id.* at 5-6 & n.2). Both contentions are without merit.

First, the prospect of inconsistent application of Section 922(g)(9) that results from the circuit conflict created by the decision below is not, as respondent contends, of a sort that is "baked into" the statute. Br. in Opp. 7. The circuit conflict the Fourth Circuit has created means that the same person who may legally possess firearms in South Carolina faces federal felony charges and up to a ten-year prison sentence if he moves to Georgia. See 18 U.S.C. 924(a)(2). That is not a type of inconsistency that Congress generally contemplates when enacting a federal criminal statute.

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[1] For example, the domestic-assault statute recently enacted in North Carolina requires that the offense occur "in the presence of a minor," which suggests that a substantial number of offenses involving domestic abuse will, of necessity, be prosecuted under other statutes. Act to Enhance the Penalty for an Assault in the Presence of a Minor, 2003 N.C. Sess. Laws 409 (codified N.C. Gen. Stat. § 14-33(d) (2007)).

The risk of inconsistency that respondent describes is one of a very different sort: the risk that different States will apply different standards in entering convictions that may serve as predicates for federal prosecution under Section 922(g)(9). See Br. in Opp. 7-9. But when Congress defines a range of predicate offenses by reference to certain common characteristics, as it has in Section 921(a)(33)(A), it generally does so to ensure, to the extent practicable, consistent with our federalism, the consistent application of *federal* law. Cf. *Taylor* v. *United States*, 495 U.S. 575, 582, 588-589 (1990) (explaining that, in enacting the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. V 2005), Congress defined predicate offenses by reference to common characteristics, rather than by reference to how States choose to label a particular offense, to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases" (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).[2]

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[2] Respondent cites this Court's recent decision in *Logan* v. *United States*, 128 S. Ct. 475 (2007), in support of the proposition that Congress "virtually guarantee[d]" that Section 922(g)(9) would be applied inconsistently by "deliberately tether[ing] its definition of 'misdemeanor crime of domestic violence' to State law." Br. in Opp. 7. Respondent's reliance on *Logan* is misplaced. The most obvious problem with respondent's reliance on *Logan*'s acknowledgment of diversity based on differences in state law is that the Court nonetheless *granted* certiorari in *Logan* to settle the meaning of federal law. *Logan* also addressed a distinct context. *Logan* concerned 18 U.S.C. 921(a)(20), which excludes convictions for which the offender had his civil rights restored from the category of convictions that, *inter alia*, qualify as predicates for sentencing under the ACCA. In response to the petitioner's argument that literal application of the civil-rights-restored exemption would anomalously treat persons whose civil rights were

Second, the decision below, if allowed to stand, will have a significant impact on federal law enforcement. It will unquestionably impede enforcement of Section 922(g)(9) in the five States within the geographic jurisdiction of the Fourth Circuit. It will also, contrary to respondent's argument (Br. in Opp. 6 n.2), impose substantial additional burdens on administration of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t), which will now require analysis not only of whether an out-of-state buyer's prior convictions disqualify him from firearms ownership under the interpretation of Section 922(g)(9) that prevails in the jurisdiction in which the transaction occurs, but also of whether the prior convictions are considered disqualifying in the buyer's State of residence. See 18 U.S.C. 922(a)(3) and (b)(3).

B. The Court Of Appeals' Decision Is Incorrect

Respondent contends (Br. in Opp. 9-15) that this Court's review is not warranted because the Fourth Circuit's decision was correct. As respondent himself acknowledges (*id.* at 9), his merits arguments provide no reason for

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never lost more harshly than those who lost, then regained, their civil rights, the Court echoed the Second Circuit's observation that such anomalies "are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states." *Logan*, 128 S. Ct. at 483 (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)). But Congress's decision "to have restoration triggered by events governed by state law" under Section 921(a)(20), *ibid.* (quoting *McGrath*, 60 F.3d at 1009), is fundamentally different from Congress's decision to make certain legal consequences turn on convictions for offenses that share specified characteristics, whether those convictions were entered in federal, state, or tribal courts. See 18 U.S.C. 921(a)(33)(A). In any event, the fact that Congress may accept a degree of variation depending on actual differences in state law is not a reason to leave unresolved a conflict concerning a single question of federal law.

declining to resolve the division of authority among the circuits. Those arguments are, in any event, unsound.

1. Respondent first argues (Br. in Opp. 10-12) that the text of Section 922(a)(33)(A) supports the court of appeals' construction because Congress did not insert a more dramatic "grammatical break" between the phrase "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and the phrase "committed by a current or former spouse, parent, or guardian of the victim." See 18 U.S.C. 921(a)(33)(A). But while it may be true that Congress could have made its intent even clearer by separating the two phrases with a semicolon, rather than a comma, see Br. in Opp. 10, the punctuation of the phrase cannot override the plain meaning of the words Congress used in the statutory definition. See, *e.g.*, *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). That definition uses the word "element" in the singular, and that element can only be the "use or attempted use of physical force." Although respondent suggests (Br. in Opp. 13-14) that the "committed by" phrase modifies the "use of force" language, thereby creating a "singular" element that happens to have multiple parts, that suggestion is contrary to the plain meaning of the word "commit." A person commits a criminal offense. A person does not "commit" an "element" or a "use of force."

2. Respondent also contends (Br. in Opp. 10-12) that his reading of the statute is confirmed by a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulation interpreting the statutory definition of "misdemeanor crime of domestic violence," because ATF inserted a separate paragraph number and a "hard return" between the "has, as an element" phrase and the "committed by" phrase. See 27 C.F.R. 478.11. But while respondent reads ATF's

punctuation choices as a "tacit admission" that the Fourth Circuit's construction of the statute is correct, Br. in Opp. 12, the regulation points to precisely the opposite conclusion. The regulation makes clear that ATF, like the overwhelming majority of courts to address the issue, reads the statutory definition of "misdemeanor crime of domestic violence" to "include all offenses that have as an element the use or attempted use of physical force (e.g., assault and battery) if the offense is committed by one of the defined parties[,] * * * whether or not the State statute specifically defines the offense as a domestic violence misdemeanor." *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,521 (1998).

3. Respondent contends that "[t]he fact that several circuits have analyzed the identical statutory language and come to diametric conclusions * * * compels application of the rule of lenity," and therefore also compels affirmance of the judgment of the Fourth Circuit. Br. in Opp. 14-15. This Court has made clear, however, that the rule of lenity does not apply merely because it is "*possible* to articulate a construction more narrow than that urged by the Government." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Nor is "a division of judicial authority automatically sufficient to trigger lenity." *Ibid.* As this Court has explained, "[i]f that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Ibid.*

The rule of lenity is, rather, reserved for situations in which, "after seizing everything from which aid can be derived," reasonable doubt persists about the meaning of the statute. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (citation omitted). In this case, the text, background, and purpose of Section 921(a)(33)(A) all support the conclu-

sion that Section 922(g)(9) reaches misdemeanor convictions that have, as an element, the use of force, when the government can prove that the required domestic relationship exists between offender and victim. Resort to the rule of lenity is unwarranted.

4. Finally, respondent asserts (Br. in Opp. 15-17) that the Fourth Circuit's judgment may be upheld on alternative grounds. Specifically, respondent contends that, under this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005), a court may not look beyond the fact of conviction, the statutory definition of the offense, and, in the case of conviction entered by guilty plea, records of findings of fact adopted by the defendant upon entering the plea, in order to determine whether a prior conviction qualifies as a misdemeanor crime of domestic violence under Section 921(a)(33)(A). Therefore, in respondent's view, *Taylor* and *Shepard* preclude adoption of a rule that would permit the government to prove the identity of the victim of the defendant's violent crime by other means, such as by presenting documentary or testimonial evidence. Respondent is incorrect.

Taylor and *Shepard* govern the range of documents that may be used to establish that a defendant's prior convictions categorically qualify as predicates for sentencing under the ACCA, based on the *elements* of those offenses; for that purpose, *Taylor* precludes consideration of the specific conduct underlying the convictions. See *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 16, 26. Neither case, however, purports to limit the kinds of evidence that the government may adduce at trial to establish matters *other* than the elements of the defendant's prior offense. Respondent's argument thus depends crucially on resolution of the question presented: whether Section 921(a)(33)(A) requires that, to qualify as a misdemeanor crime of domestic vio-

lence, an offense contain a domestic-relationship *element*. If Section 921(a)(33)(A) does not contain such a requirement, then the principles underlying *Taylor* and *Shepard* are clearly inapplicable to the issue of whether a qualifying domestic-relationship existed between the defendant and the victim. See, *e.g.*, *Meade*, 175 F.3d at 221. The domestic-relationship issue can, therefore, be established by the defendant's admission or by presentation of testimonial and documentary evidence. In this case, it is undisputed that the victim of respondent's battery was his wife, with whom he cohabited and had a child in common. See Pet. App. 20a n.11. Respondent's argument provides no basis for declining to answer the question this case presents.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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